SERVED: November 5, 2002

NTSB Order No. EA-5003

UNITED STATES OF AMERICA
**NATIONAL TRANSPORTATION SAFETY BOARD**
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 4th day of November, 2002

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| MARION C. BLAKEY,<br>Administrator,<br>Federal Aviation Administration,<br><br>Complainant,<br><br>v.<br><br>BRYAN HOWARD TAYLOR,<br><br>Respondent. | Docket SE-16670 |

**OPINION AND ORDER**

The respondent has appealed from the oral initial decision Administrative Law Judge William A. Pope rendered in this proceeding on September 26, 2002, at the conclusion of an evidentiary hearing.[1] By that decision, the law judge affirmed an emergency order of the Administrator revoking respondent's airman and medical certificates for his operation of an aircraft

[1]An excerpt from the hearing transcript containing the initial decision is attached.

while under the influence of alcohol.[2] For the reasons discussed below, the appeal will be denied.[3]

The Administrator's August 29, 2002 Emergency Order of Revocation alleged, among other things, the following facts and circumstances concerning the respondent:

1. At all times material herein you were and are now the holder of Airline Transport Certificate No. 246536081, a Flight Instructor Certificate, and a First Class Medical Certificate.

2. On or about August 11, 2002, at approximately 3:00 a.m., you operated civil aircraft N4360U, a Piper PA-46-310-P, the property of another, by taxiing the aircraft on the Ocean Isle Beach Airport, in Ocean Isle, North Carolina.

3. The operation ended when you taxied N4360U into a ditch on the airport, damaging the aircraft.

4. At 5:00 a.m. at the airport, a Brunswick County, North Carolina police officer (sergeant) administered to you a field sobriety test because you appeared to the police officer to be under the influence of alcohol.

5. The results of the test of an alco-sensor given at the airport at approximately 5:00 a.m. revealed that you had an alcohol concentration of .10.

6. A second test, a Breathalyzer test, was administered at the Brunswick County Sheriff's Department at approximately 7:18 a.m.

7. The result of the Breathalyzer test revealed that you had an alcohol concentration of .07.

8. When you taxied N4360U as described above, you had more

[2]The revocation of respondent's airman certificates was based on his alleged violation of section 91.13(b) of the Federal Aviation Regulations ("FAR"), 14 C.F.R. Part 91. The revocation of respondent's medical certificate was predicated on a finding by the Federal Air Surgeon that the respondent was unable to safely perform the duties or exercise the privileges of any airman certificate because he did not meet the mental qualifications in FAR sections 67.107(b)(3), 67.207(b)(3), and 67.307(b)(3).

[3]The Administrator has filed a reply opposing the appeal.

than .04 percent by weight alcohol in your blood.

9. When you taxied N4360U you had consumed an alcoholic beverage within the preceding 8 hours.

10. When you taxied N4360U you were under the influence of alcohol.

The respondent offered no evidence to contradict these allegations, which he did not dispute in any material respect.[4] Instead, respondent argued, for a variety of reasons we show below are meritless, that revocation of his certificates was either unsupported by law or not warranted. The law judge found his arguments unpersuasive and unavailing, an assessment with which we agree.

Respondent testified (Tr. at pp. 75-78) that on Saturday, August 11, 2002, he and another individual made a 10-minute flight at about 11:00 p.m. from Elizabethtown, North Carolina, to Ocean Isle, North Carolina, to deliver a paycheck to a part-time pilot co-worker who wanted it for a vacation he was starting the next day. He indicated that the airport had runway but no taxiway or ramp lights, and that his aircraft's taxi light was burned out. He apparently parked the aircraft on or near the taxiway short of the ramp, and said that he was only planning to spend a few minutes at the airport and did not want to taxi the aircraft through the ramp area because it was "pretty full of

[4]Respondent specifically admitted, among other things, that he had operated his employer's aircraft while under the influence of alcohol he had consumed within the previous 8 hours. By his own account, respondent drank between 32 and 40 ounces of beer in the two and a half to four-hour period before he taxied the aircraft into a steep ditch, causing about $150,000 to $160,000 in damage.

airplanes." However, after the co-worker met them at the airport, respondent and his passenger decided to go with him to a nearby karaoke bar and grill, where other acquaintances had already gathered, and where respondent subsequently began drinking beer. He stated that at around 12:30 a.m. he determined that because he had been drinking he was going to spend the night in Ocean Isle, instead of returning home to Elizabethtown, as he had originally planned to do. At about 1:30 a.m., however, he decided to walk the mile or so back to the airport from the bar to move the aircraft to, in his words, a "safer" location, by which we assume, although it is far from clear from his testimony, that he meant to a position that would not be on (perhaps blocking?) the taxiway where he had earlier left it.[5] He appears to have taxied only a short distance before the aircraft ran off the taxiway and into a ditch directly ahead and between the taxiway and the ramp area where respondent says he intended to re-park the aircraft.

Respondent's first argument on appeal challenges the

[5]On cross-examination respondent confused the issue further by asserting that he wanted to move the aircraft because "the night before there had been some vandalism of aircraft there" (Tr. at p. 84). He did not explain how moving the aircraft to a tie-down location 30 to 50 feet away from where he had first parked it would lessen that possibility. He also indicated that he settled for the original parking location because of poor lighting, a circumstance that obviously would have not have changed while he was in the bar. These factors could be viewed as supportive of a finding that respondent did not return to the airport to reposition the aircraft, but, rather, went back there in the middle of the night, alone and by foot, to fly home. Whether he wanted to do so, of course, became moot after the provident intervention of the ditch.

sufficiency of the Administrator's basis for revoking his medical certificate. Specifically, respondent maintains that it is not enough, under the regulation, for the Administrator, acting through the Federal Air Surgeon, to rely on the circumstances of the one incident addressed in the complaint as grounds for a determination that he does not meet the mental qualification standard in FAR sections 67.107(b)(3), 67.207(b)(3), and 67.307(b)(3).[6] We are not persuaded that more is, or should be, required, for aside from the fact that respondent's position is not supported by any reference to regulatory history or precedent, it is predicated on the assumption that the Federal Air Surgeon can not find a pilot unqualified by reason of substance abuse unless there have been multiple episodes. Respondent's opinion in this respect, which can be distilled to a belief that the Federal Air Surgeon must give an airman more than

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[6]These provisions provide, in identical language for each of the three classes of medical certificate, as follows:

> **§ 67.107 [207, and 307] Mental.**
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> Mental standards for a [first, second or third] class airman medical certificate are:
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> * * * * *
>
> (b) No substance abuse within the preceding 2 years defined as:
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> * * * * *
>
> (3) Misuse of a substance that the Federal Air Surgeon, based on case history and appropriate, qualified medical judgment relating to the substance involved, finds—
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> (i)Makes the person unable to safely perform the duties or exercise the privileges of the airman certificate applied for or held; or
>
> (ii)May reasonably be expected, for the maximum duration of the airman medical certificate applied for or held, to make the person unable to perform those duties or exercise those privileges.

one chance to show that he will not misuse alcohol in a way that adversely affects aviation safety, does not outweigh the Federal Air Surgeon's interpretation that a single occurrence of substance abuse is sufficient under the regulation.

We also disagree with the contention that this incident did not establish an adequate case history for the lack of mental qualification determination that was made. Respondent did not, after all, simply drink a little too much and then avoid conduct, either by pre-arrangement or self-discipline, that might have potentially harmful or costly consequences for himself or others, a course of action that a responsible user of alcohol would follow.[7] Rather, he started drinking at a time when he had unfinished aviation business he says he wanted to attend to (i.e., relocating the aircraft he had left in a spot with which he was admittedly "uncomfortable") and when he had not considered how that aviation matter could be properly accomplished in the event alcohol consumption precluded his lawful attention to it; he drank to excess, consuming enough beer to raise his blood alcohol level to *at least* two and a half times the *maximum* allowable for aircraft operations; and, then, despite knowledge of regulations that forbade his operation of an aircraft after drinking and that his consumption of beer made those regulations

[7]Aviation activity does not need to be involved in order for the Federal Air Surgeon to find under the regulation that an airman's misuse of a substance reflects on his mental qualifications to hold a medical certificate. It seems to us that where an aviation nexus is present, as in this case, a judgment that qualification is lacking cannot reasonably be assailed as arbitrary, capricious, or irrational.

applicable to him, proceeded to the airport to, if he is to be believed, just move his employer's aircraft. Given this history, we cannot quarrel with the Federal Air Surgeon's determination that the incident provided an ample basis for believing that respondent may well represent a threat to aviation safety the next time he starts consuming alcohol, despite his insistence that this was simply an isolated case of bad judgment.[8] Nothing in respondent's brief supports the view that the Federal Air

[8]Although respondent stipulated to being under the influence of alcohol when he taxied the aircraft, his testimony at the hearing suggests that he does not agree that that circumstance meant he could not have safely operated the aircraft. The following exchange took place during cross-examination:

> Q. But when you flew that night you didn't intend to stay the whole night [in Ocean Isle], correct?
> A. Correct.
> Q. You intended to fly out later?
> A. Yes, sir.
> Q. Okay. Then you had a few beers and you decided – what did you decide then?
> A. Well, I decided that since I'd been drinking I wasn't going to fly.
> Q. So, you knew you were in no shape to fly the airplane out that night, right?
> A. I don't want to say that I wasn't in shape to fly but I know what the rules are and I felt like that –I don't want to break any rules - I take my flying very seriously.
> Q. I don't want to put words in your mouth, are you saying that you were in shape to fly?
> A. I had been drinking and I know that's against the rules, so according to the FAA, no, I was not in shape to fly. But as far as being impaired I would not – I wouldn't say that I was impaired.

Respondent's apparent unwillingness (or inability) to accept that his alcohol consumption could have negatively impacted upon his performance as an airman suggests that he simply does not appreciate the safety issues posed by drinking alcohol and operating aircraft. It also establishes that respondent, but for the regulatory prohibitions on drinking and flying, did not see the fact that he had drunk four to five 8-ounce "cups" of beer to be a reason for him not to fly the aircraft home.

Surgeon could not reasonably find that respondent's actions were so patently inappropriate that they demonstrated not merely a lapse of judgment, but an inability to conform his conduct to the dictates of law and safety once some amount of alcohol had been ingested.

Respondent's next argument fares no better. It rests on the premise that he should not be held accountable for a violation of FAR section 91.13(b)[9] because neither that regulation nor any other FAR defines what he did as conduct to be avoided, unlike, for example, FAR section 91.17, which sets forth, in detail, the regulatory prohibitions concerning alcohol use by airmen acting or attempting to act as crewmembers on an aircraft.[10] Stated

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[9]FAR section 91.13 provides as follows:

**§ 91.13 Careless or reckless operation.**

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

(b) *Aircraft operations other than for the purpose of air navigation.* No person may operate an aircraft, other than for the purpose of air navigation, on any part of the surface of an airport used by aircraft for air commerce (including areas used by those aircraft for receiving or discharging persons or cargo), in a careless or reckless manner so as to endanger the life or property of another.

[10]FAR section 91.17(a) provides as follows:

**§ 91.17 Alcohol or drugs.**

(a) No person may act or attempt to act as a crewmember of a civil aircraft --

(1) Within 8 hours after the consumption of any alcoholic beverage;

(2) While under the influence of alcohol;

differently, respondent's position, in non-legalistic terms, is that he knew that he could not fly an aircraft while drunk, because the Administrator had told him so, but not that he could not taxi one while drunk, because the Administrator had not so advised him.[11] Respondent's argument is meritless.[12]

FAR section 91.13's prohibition against the creation of careless or reckless endangerments is generic because it would be impossible for the Administrator to attempt to list by regulation every unsafe practice that an airman should avoid.[13] It has

(..continued)

> (3) While using any drug that affects the person's faculties in any way contrary to safety; or
>
> (4) While having .04 percent by weight or more alcohol in the blood.

The regulations elsewhere define crewmember as "a person assigned to perform duty in an aircraft during flight time" (14 C.F.R. 1.1). For this reason, we surmise, the Administrator did not charge the respondent under FAR section 91.17.

[11]The most remarkable thing about this contention is that respondent would advance it as part of an effort to get his operating authority back. We assume, nevertheless, that the respondent is not suggesting that he did not appreciate, before this proceeding was initiated, that taking the controls of an aircraft while intoxicated, even to just taxi it, did not entail a safety risk to be shunned. Rather, we read his point to be that he cannot be held accountable for such conduct in the absence of a regulation actually condemning it, a view we reject above.

[12]Also without merit is respondent's contention that the Administrator cannot revoke his airman certificates because one need not be a certificate holder to taxi an aircraft. As we see it, respondent's attempt to re-park the aircraft stemmed from his having earlier flown it to Ocean Isle from Elizabethtown. It was thus not an unrelated airport movement, but an extension or continuation of that flight, undertaken by the respondent to fulfill his responsibility to secure the aircraft following an operation conducted pursuant to certificate authority.

[13]Somewhat inconsistently, respondent does not suggest that

therefore long been viewed to be sufficient, where a pilot was alleged to have run afoul of certificate responsibilities under FAR section 91.13, to determine whether the putative conduct posed an inherent danger.[14] Because, in our opinion, there can be no legitimate question that taxiing while intoxicated qualifies under that test, the regulation is applicable even though the Administrator has not elsewhere in her regulations expressly outlawed taxiing an aircraft while under the influence of alcohol.[15]

Most of respondent's brief, and all of his remaining arguments, is devoted to argumentation to the effect that neither Board precedent nor the Administrator's sanction guidance supports revocation for taxiing an aircraft while intoxicated, and that the proper sanction here should not be the same as would have been imposed if respondent had flown the aircraft while intoxicated. We find no merit in respondent's vigorous and various contentions as to why the seriousness of his conduct should be discounted because he only operated the aircraft on the

(..continued)
the lack of a specific regulatory prohibition against taxiing an aircraft at night without taxi lights at an unlighted and unfamiliar airport should insulate him from accountability under FAR section 91.13(b). Rather, he maintains that any review of that issue should exclude the factor of his alcohol use because the regulation that does involve alcohol use only applies to flying.

[14]*See* Haines v. D.O.T., 449 F.2d 1073 (CADC 1971).

[15]We assume that the reason the regulations on alcohol and drug use do not expressly address the matter of drinking and taxiing is that such conduct has not in the past occurred at a level of frequency that warranted specific regulatory attention, a circumstance borne out by our lack of precedent on the issue.

ground, for they are mistakenly predicated on the unarticulated belief that flying while intoxicated is somehow more serious, from the standpoint of assessing his qualification to hold any airman certificate, than just taxiing in that condition. In our view, it is not.

We recognize that flying an aircraft while under the influence poses a greater potential risk of injury or damage than simply taxiing one. However, our precedent and the Administrator's sanction policy establish that it is not so much the magnitude of harm that justifies the remedial sanction of revocation as it is the institutional loss of trust in an individual's self-control or compliance attitude that certain, usually willful, conduct (e.g., intentional falsifications, operations while suspended, and operating an aircraft while under the influence) inevitably produces. Thus, the focus in a case involving an intoxicated pilot is not how the airman intended to operate the aircraft, but that he intended to operate it at all.[16] If it is shown that he did, the appropriate sanction is revocation, for airmen possessing the requisite care, judgment, and responsibility, that is, those who can be relied upon not to knowingly compromise aviation safety, do not take the controls of an aircraft for any purpose while under the influence of alcohol.

In view of the foregoing, we think it is irrelevant that the

[16]Consistent with this rationale is the fact that the regulation that specifically addresses flight operations while intoxicated, FAR section 91.17, makes no distinction between attempting to act as a crewmember and acting as a crewmember. Both are forbidden.

sanction recommended for "operations" while under the influence of alcohol in the Administrator's Sanction Guidance Table, FAA Order 2150.3A, namely, revocation to emergency revocation, *may* have been written with only flight operations, such as those proscribed in FAR section 91.17, in mind. The guidance literally applies in the instant context as well and, as discussed above, the intent to engage in either flying or taxiing while under the influence reflects an equally deficient judgment. Moreover, FAR section 91.13 bans careless or reckless operations on the ground as well as in the air, and no sound reason exists for treating one more leniently than the other.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The respondent's appeal is denied; and

2. The initial decision and the emergency order of revocation are affirmed.

CARMODY, Acting Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.